UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15

THE CAJUN COMPANY, INC. **Employer**	*	
and	*	**Case No. 15-RC-8615**
INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, LOCAL UNION NO. 55 **Petitioner**	*	

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer is a contractor that provides maintenance services at power plants. For the last seventeen to eighteen years, it has had contracts with Mississippi Power, a Southern Company entity, to supply maintenance services at two power plants, Plant Watson in Gulfport, Mississippi and Plant Daniels in Escatawpa, Mississippi. Plant Watson and Plant Daniels are about thirty-seven (37) miles apart. The Petitioner, International Association of Heat and Frost Insulators and Asbestos Workers, Local Union No. 55, filed the petition in this matter with the National Labor Relations Board, herein the Board, under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, seeking to represent a unit comprised of "all first class and helper insulators and asbestos workers employed by The Cajun Company, Inc. at its facilities located at the Plant Daniels site in Escatawpa, Mississippi and the Plant Watson site in Biloxi, Mississippi." The Petitioner sought to exclude from the unit all scaffold carpenters, office clerical employees, professional employees, managers, guards, and supervisors as defined in the Act. A hearing officer of the Board held a hearing on June 6, 2005, and the parties filed briefs with me.

At the hearing, the Petitioner and the Employer (herein collectively called the Parties) stipulated and I find that the mechanic specialists, mechanic 1, and apprentice 1/laborers shall be included in the bargaining unit. Additionally, the Parties stipulated and I find that office clerical employees, professional employees, managers, guards, and supervisors as defined by the Act shall be excluded from the unit. Further, the Parties stipulated and I find that Site Manager Timothy Gele, Office Manager Patsy Gele, and Supervisor Bryan Woodcock are statutory supervisors and are excluded from the bargaining unit. I note the evidence reflects that Timothy Gele, Patsy Gele, and Woodcock possess authority in the interest of the Employer to hire, fire,

discipline, or responsibly direct employees using independent judgment. The Parties further stipulated, and I find, that the terms mechanic specialists, mechanic 1, and apprentice 1/laborers as well as the listed exclusions, encompasses all of the employees employed by the Employer. Accordingly, I find that there are no employees employed by the Employer classified as scaffold carpenters and that, therefore, the issue of their inclusion or exclusion is not before me.

There are two issues to be decided in this matter. The first issue is whether individuals in the job classification of working foremen and John Senter are statutory supervisors. The Employer acknowledges that John Senter functioned as a working foreman for a few weeks in April 2005, but the Employer asserts that Senter is a mechanic specialist and has not functioned as a working foreman since well before the Union filed the petition in this matter. However, the Union argues in its brief that Senter and the individuals employed as working foremen have the authority to assign and responsibly direct others and to adjust grievances, and thereby are statutory supervisors who should be excluded from the bargaining unit.

The second issue to be decided is whether the *Daniel/Steiny* formula is applicable for determining voter eligibility. The Employer contends that it is engaged in the maintenance industry, not the construction industry. The Employer further contends that the majority of its work is done between the months of January and May each year, during the "outage season," and as such, its business operation is seasonal. Therefore, the Employer argues that the *Daniel/Steiny* formula is not applicable. The Petitioner, in contrast, asserts that the Employer performs work that the Board has found to be construction work and is, therefore, engaged in the building and construction industry. As such, the Petitioner asserts that the *Daniel/Steiny* formula should be used.

Based on stipulations of the Parties and the entire record in this proceeding, and for the reasons set forth below, I find that individuals employed as working foremen and John Senter are not statutory supervisors and shall be included in the bargaining unit. Further, I find that the Employer is engaged in the construction industry and that the *Daniel/Steiny* voter eligibility formula is applicable.

I. RECORD EVIDENCE

In reaching my determination that individuals employed as working foremen and John Senter are not statutory supervisors and that the *Daniel/Steiny* voter eligibility formula is applicable, I considered the nature of the Employer's business and its current operations at Plant Watson and Plant Daniels. As to the nature of the Employer's business, I considered among other things more fully set out below, that the Board has determined that the removal of asbestos and the installation of insulation "affect the structure of buildings and equipment, such as boilers and pipes, which, after installation, have become an integral part of the structure itself" and accordingly, is work in the building and construction industry. *U.S. Abatement, Inc*., 301 NLRB 451, 456 (1991). I have specifically considered the Board's well established policy to favor and not to restrict eligibility to vote. *Ameritech Communications*, 297 NLRB 654 (1990) Accordingly, I have found that application of the Daniel/Steiny formula in the instant case will best serve that goal by enfranchising employees who, although they work on an intermittent bases, have sufficient interest in the employers' terms and conditions of employment to warrant being eligible to vote. As to the supervisory issue, I adhered to the well-established principle

that the party alleging supervisory status has the burden of proving that it exists. *NLRB v. Kentucky River Community Care, Inc*., 532 U.S. 706, 711 (2001).

A. Overview of Cajun Company, Inc.

1) <u>The work performed by Cajun Company, Inc.</u>

The employees in the stipulated bargaining unit build and tear down scaffolds, install insulation, remove asbestos, install cabinets/carpentry work, install floor and ceiling tiles, install storm shutters, pour asbestos refract (a high temperature insulation that looks like concrete used to repair breaks in tubes), and sandblast and paint. The majority of such work is done between the months of January and May each year, during, what the Employer termed as the "outage season." In addition to the aforementioned construction work, the Employer also performs maintenance services, including: cleaning condensers, cutting grass, weed eating, replacing motor and air conditioning filters, cleaning power equipment, cleaning the coal area, cleaning belts on the coal conveyor, digging out coal bunkers, cleaning marine docks, cleaning klinkers and spills, setting up tables and chairs for conferences, and moving furniture. The Employer does not repair any of the power equipment.

The removal and installation of insulation account for about fifteen to eighteen percent of the work done by the Employer at Plant Watson and Plant Daniels. Building and tearing down scaffolds account for about eighty-five percent of the work.

2) <u>Outages</u>

The Employer provides its services at Plant Watson and Plant Daniels throughout the year. The Employer's workload, however, fluctuates according to the needs of Mississippi Power. Specifically, there are unscheduled outages that occur throughout the year at the plants, such as when a boiler blows a tube and has to be repaired. Such unscheduled outages do not increase the Employer's workload, and the work is performed by the Employer's core workforce, which consists of about sixteen (16) employees that perform multiple tasks.

In addition to unscheduled outages, there are times during the year when the demand for electricity decreases and Mississippi Power schedules its boilers to be taken out of service for maintenance and repairs. This is typically done each year between the months of January and May. The Employer refers to this period of scheduled outages as the "outage season."

A couple of months in advance of the approximate date of a scheduled outage, Mississippi Power notifies the Employer. About two weeks before a scheduled outage, Mississippi Power provides the Employer with the tasks and the amount of work to be performed during the outage. The Employer's site manager, using the information the Employer receives from Mississippi Power, estimates how many employees will be required to complete the work. About a week to ten days before an outage actually starts, and throughout the outage season, the site manager hires the necessary number of employees needed to supplement its core workforce for the completion of the work. The site manager informs the newly hired employees of the estimated number of weeks for the outage, six to twelve weeks. The Employer refers to these supplemental employees as "outage employees."

During the outage season, the Employer's workload increases, particularly its scaffolding work, because it builds scaffolds used by Mississippi Power employees as well as scaffolds used

by other contractors on the jobsite. The Employer's core workforce, supplemented with outage employees, handles the increased workload. The record testimony establishes that during the 2005 outage season, the Employer utilized word of mouth advertising and the Mississippi unemployment office to solicit and hire eighteen (18) outage employees to complement its core workforce, which consisted of thirteen (13) employees at that time. Core workforce employees and outage employees share in the same work and receive the same benefits.

The Employer's site manager informs newly hired outage employees that they must perform multiple tasks. The site manager has hired outage employees that specialize in scaffold building or insulation work, such as sheet metal mechanics and scaffold builders. Nonetheless, as it does with employees in its core workforce at Plant Watson and Plant Daniels, the Employer requires such employees to also perform other tasks in addition to their specialty.

The Employer's workload decreases at the end of the outage season, and the Employer usually discharges about sixty percent of its workforce at the end of the outage season each year due to lack of work. The employees that remain in the Employer's core workforce at the end of the outage season continue to work throughout the year performing multiple tasks, including mostly scaffolding work with some insulating work. The undisputed record testimony reflects that at the time of the hearing, the Employer employed about three (3) employees who were originally hired for an outage.

The Employer does not maintain or follow any recall policy, and discharged employees are not subject to recall; they must reapply for any job openings with the Employer. Outage employees are not afforded any special preference for rehire. About three or four outage employees hired each year return to work with the Employer.

Moreover, the evidence reflects that due to budget restraints imposed by Mississippi Power within the last year and a half, the Employer has laid off its entire workforce three times at Plant Daniels. The layoffs have lasted from two weeks up to four months. Likewise, at Plant Watson, the Employer has laid off nearly its entire workforce twice due to budget restraints.

3) <u>Plant Supervision and employee interchange</u>

The Employer's site manager, Timothy Gele, and Office Manager Patsy Gele are stationed at Plant Watson. Supervisor Bryan Woodcock is stationed at Plant Daniels. The Parties have stipulated that Timothy Gele, Patsy Gele, and Bryan Woodcock are statutory supervisors.

The record discloses that Site Manager Gele travels the 37 miles to Plant Daniels at least once every two to three weeks to check on the work being performed. Additionally, Gele, using link radios provided by Mississippi Power, communicates with Bryan Woodcock about work assignments. There is conflicting testimony in the record as to whether Woodcock and Gele are the only individuals employed by the Employer that are provided with link radios. Specifically, there is testimony that suggests that on at least one occasion, an apprentice I/laborer and John Senter had a link radio.

Gele and Woodcock spend about fifty percent of their time interacting with Mississippi Power, and they spend the other fifty percent of their time performing the same work as employees in the stipulated unit.

The Employer, as often as weekly, interchanges employees between Plant Watson and Plant Daniels. The interchange occurs throughout the year and affects about two to three employees at a time. However, the same employees are not necessarily chosen each time for the interchange. At times throughout the year, the Employer will shift all employees at one of the plants to work on a particular project at the other plant. Recently, for instance, Plant Daniels experienced a leak in some high temperature re-heater tubes and the Employer moved all of its Plant Watson employees to Plant Daniels to build scaffolds that were used to repair the valves.

4. **Plant Watson**

The Employer has had the contract to perform the work at Plant Watson since at least 1989. The Employer does a tremendous amount of scaffolding work and a little insulation work at Plant Watson. The Employer also does asbestos abatement work year round. Additionally, the Employer installs floor and ceiling tiles, storm doors and shutters, changes windows, and sandblasts and paints. Further, the Employer installs furniture, cleans coolers and condensers, cuts grass, weed eats, keeps all conveyors and the live storage facilities clean, cleans marine decks and bottom ash pits, and cleans spills and klinkers. Moreover, throughout the year, the Employer replaces about five to six hundred air conditioning filters throughout the plant on a two, four, eight, or twelve-week basis.

Excluding Site Manager Timothy Gele and Office Manager Patsy Gele, the Employer employs ten to eleven employees at Plant Watson. The Employer employs five (5) mechanic specialists, one (1) mechanic 1, and two (2) apprentice 1/laborers at Plant Watson. The mechanic specialists perform every task that the Employer performs at the plant. They cut grass, insulate, build scaffolds, hang cabinets, paint, sand blast, clean coolers, shoot condensers (a cleaning process), and change filters. The mechanic 1s have some experience in sheet metal and insulation, and they assist with scaffolding and insulation related work. The apprentice 1/laborers shoot coolers and are allowed to help out with filters and other tasks.

The employees work four ten hour days Monday through Thursday, from 6:00 a.m. to 4:30 p.m.. The employees receive a 9:00 a.m. break, a lunch break at 12:00 p.m., and a 2:30 p.m. break. The employees work overtime as requested.

5. Working foremen at Plant Watson

At the time of the hearing, the Employer also employed two (2) working foremen at Plant Watson, Dondi Christo and Steve Cospielich. Christo has been employed with the Employer for about four or five years, and he has been a foreman for about a year and a half. Cospielich also has been employed with the Employer about four or five years, and he has been a foreman for about three and a half years. Christo and Cospielich, like all the Employer's employees at Plant Watson and Plant Daniels, report directly to Site Manager Gele.

The working foremen spend about fifteen percent of their time communicating with Site Manager Timothy Gele each day about how the job is progressing. They also discuss what job tasks need to be accomplished. The working foremen spend the other eighty-five percent of their time working alongside employees in the stipulated unit. They perform the same tasks as other employees to complete the job, including grinding on penthouse headers and cleaning filters. The working foremen are more knowledgeable about the plant and job, particularly insulation and scaffolding work, than less experienced employees in the stipulated unit. Therefore, if something goes wrong, the working foremen suggest ways to fix it.

The working foremen and employees in the stipulated unit work the same hours and are paid hourly. They all get paid time and a half for overtime hours, and they have the same pay days. The working foremen, however, are paid about .90 to $1 per hour more than employees in the stipulated unit.

Additionally, the working foremen and employees in the stipulated unit park in the same area and enter and exit the plant through the same gate. There is no distinction in the insurance received by the working foremen and employees in the stipulated unit. Moreover, the working foremen and employees in the stipulated unit supply their own hard hats, which do not have to be a designated color. The foremen do not wear any clothing that distinguishes them from employees in the stipulated unit.

The working foremen do not possess or exercise any authority to hire, fire, demote, suspend, or transfer employees. The working foremen, as well as employees in the stipulated unit, can recommend such actions, but Site Manager Timothy Gele conducts his own investigation and makes the final decision. Recommendations made by the working foremen are not given any more weight or special consideration than recommendations made by employees in the stipulated unit. Ultimately, all disciplinary or termination decisions are made by Site Manager Timothy Gele and Supervisor Bryan Woodcock.

Working foremen do not deal with or authorize employee requests for time off. Employees call Site Manager Gele, Supervisor Woodcock, or Office Manager Patsy Gele if they are not going to report to work. Further, the working foremen do not enforce policies or work rules, complete performance evaluations, decide whether overtime is necessary or make any compensation decisions. Site Manager Gele makes all such decisions. The Employer does not complete performance evaluations on its employees. Finally, the working foremen do not handle grievances or complaints.

6. Plant Daniels

Similar to Plant Watson, the Employer has had its contract at Plant Daniels for about seventeen to eighteen years. Bryan Woodcock is the Employer's supervisor at Plant Daniels. Woodcock spends fifty percent of his work time interacting with Mississippi Power and communicating with Site Manager Gele, and he spends the other fifty percent in the field working alongside employees in the stipulated unit. At the time of the hearing, the Employer did not employ any working foremen at Plant Daniels, but the record reflects that when there are working foremen at Plant Daniels, Woodcock supervises them. The Parties agree that Woodcock is a statutory supervisor and is excluded from unit.

Plant Daniels is an asbestos free plant. The Employer also performs scaffolding and insulation work at Plant Daniels. In addition to the scaffolding work, the Employer also performs refractory work, which is a high temperature insulation that looks like concrete, and provides constant clean up of coal by-products. Additionally, the Employer also shoots the condenser.

The Employer employs one (1) mechanic specialist and about five (5) apprentice 1/laborers at Plant Daniels. At the time of the hearing, the Employer did not employ any

employees classified as mechanic 1 at Plant Daniels. The mechanic specialists perform every task that the Employer performs at the plant. They cut grass, insulate, build scaffolds, hang cabinets, paint, sand blast, clean coolers, shoot condensers, and change filters. The apprentice 1/laborers at Plant Daniels are generally limited to doing clean up. They clean conveyors, base slabs, and spills throughout the plant. The apprentice 1/laborers are not allowed to cut grass at Plant Daniels, but they do weed eat during the summertime and fall.

The employees work 6:30 a.m. to 2:30 p.m. five days per week, Monday through Friday. The employees work overtime as requested.

7. Working foremen at Plant Daniels

Although, at the time of the hearing, the Employer did not employ any working foremen at Plant Daniels, the record testimony reflects that John Senter, a mechanic specialist, functioned as a working foreman at Plant Daniels for about three weeks in April 2005. The testimony reflects that Senter was sent to Plant Daniels because the Employer was getting a tremendous amount of scaffolding work. Senter's job as working foreman was to help out and keep the employees going from job to job. Senter's job duties were the same as the working foremen at Plant Watson, and Senter received an increase in pay of about .90 to $1 per hour, the same increase received by all working foremen.

The record reflects that Supervisor Bryan Woodcock supervised Senter when Senter worked as a working foreman at Plant Daniels. Woodcock made the work assignments each morning to employees.

There is very limited record testimony that suggests that John Senter served as an acting supervisor for about two weeks in mid-April 2005 when Supervisor Bryan Woodcock was absent. Additionally, the record testimony suggests that Senter gave work assignments to employees in the stipulated unit by telling the employees to follow another employee in the stipulated unit and that that employee would show employees where they were to work. The record is void of more specific details. The record testimony also suggests that an apprentice 1/laborer also gave work assignments to other employees in the stipulated unit. Again, the record is void of specific details.

The uncontested record testimony reflects that at the time of the hearing, Senter was working at Plant Watson as a mechanic specialist.

II. ANALYSIS

A. Statutory Supervisors

Section 2(11) of the National Labor Relations Act, hereinafter "Act," defines the term "supervisor" as:

> [A]ny individual having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the

exercise of such authority is not of a merely routine or clerical nature, but requires the exercise of independent judgment.

The possession of any one of the indicia of supervisory authority set forth in Section 2(11) of the Act is sufficient to confer supervisory status. *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-574 (1994). Such authority, however, must be exercised with independent judgment on behalf of the Employer, and not in a routine manner. *Id.* If an employee exercises supervisory authority in a routine, clerical, perfunctory, or sporadic manner, then supervisory status is not conferred on the employee. *Bowne of Houston, Inc*., 280 NLRB 122, 1223 (1986). Employees who merely relay information from management to other employees are not supervisors. *Id*. Further, it is a well-established principle that the party alleging supervisory status has the burden of proving that it exists. *NLRB v. Kentucky River Community Care, Inc*., 532 U.S. 706, 711 (2001). Thus, any insufficiency of evidence in the record is to be construed against the party asserting supervisory status. *Michigan Masonic Home*, 332 NLRB No. 150 (2000) citing *Elmhurst Extended Care Facilities*, 329 NLRB 535, fn. 8 (1999).

In the instant case, the Petitioner contends in its brief that the individuals employed as working foremen, Dondi Christo and Steve Cospielich, and John Senter, are statutory supervisors because they have or recently had "the authority to assign and to responsibly direct others and to adjust grievances." Notably, the Petitioner does not contend, nor does the record evidence reflect, that the working foremen and Senter exercise independent judgment in assigning or directing others or adjusting grievances. I note that neither of the two individuals employed as working foremen at the time of the hearing, nor Senter, testified at the hearing.

1. Working Foremen Classification

The record reflects that the working foremen do not possess any of the indicia of supervisory authority set forth in Section 2(11) of the Act. They do not possess or exercise any authority to hire or fire, demote, suspend, or transfer employees. The working foremen, as well as employees in the stipulated unit, can recommend such actions, but Site Manager Timothy Gele conducts his own investigation and makes the final decision. The testimony reflects that recommendations made by the working foremen are not given any more weight or special consideration than recommendations made by employees in the stipulated unit. Ultimately, Site Manager Timothy Gele or Supervisor Bryan Woodcock make all disciplinary or termination decisions.

The record reflects that the working foremen do not handle or authorize employee requests for time off. Employees call Site Manager Timothy Gele, Supervisor Woodcock, or Office Manager Patsy Gele if they are not going to report to work. Furthermore, the working foremen do not enforce policies or work rules, complete performance evaluations, decide whether overtime is necessary, or make any compensation decisions. Site Manager Gele makes such decisions. Moreover, the working foremen do not handle grievances or complaints.

To the extent the Petitioner asserts that the working foremen assign and responsibly direct employees and adjust grievances, the record is void of any evidence to support the assertion. Further, the record is void of any evidence that the working foremen adjust grievances, formally or informally, in the interest of the Employer. I find the record evidence insufficient to establish

that the working foremen exercise independent judgment in assigning or responsibly directing employees or adjusting grievances. Accordingly, I conclude that the Petitioner has failed to carry its burden of showing that individuals employed as working foremen are statutory supervisors.

2. John Senter

The record reflects that Senter, like the individuals employed as working foremen, is a senior employee with about four years of service with the Employer. The testimony reflects that for about two weeks in April 2005, John Senter functioned as a working foreman and substitute for Bryan Woodcock during Woodcock's absence from work. To the extent the record reflects that Senter exercised any authority in his limited role substituting for Woodcock, the record does not reflect that Senter was specifically given the supervisory authority possessed by Woodcock. Additionally, the evidence does not reflect that Senter substitutes for Woodcock on a regular basis. Rather, the evidence suggests that Senter's role as a working foreman and substitute for Woodcock was an irregular occurrence. The Board has held that individuals that exercise supervisory authority in a limited role as substitutes for regular supervisors on an irregular and sporadic basis are not statutory supervisors. *North Jersey Newspaper Company*, 322 NLRB 394, 395 (1996); *PECO Energy Company*, 322 NLRB 1074, 1083 (1997); *Jakel Motors, Inc*., 288 NLRB 730 (1988).

There is no record evidence providing specific incidents where Senter exercised independent judgment in assigning or responsibly directing employees or adjusting grievances. The limited testimony suggests that Senter told employees to follow another employee who would show employees where to work. To the extent the record contains broad, general statements that suggest Senter made assignments or responsibly directed other employees in his limited role as a working foreman, the statements are conclusory without corroborating evidence and offer little evidence of true supervisory discretion. The Board has held that conclusory statements made by witnesses without collaborating evidence are insufficient to establish supervisory authority. *Sears, Roebuck & Co*., 304 NLRB 193 (1991) *citing American Radiator Corp.*, 119 NLRB 1715, 1718 (1958). Further, the statements do not support a finding that the assignments Senter made to other employees are more than routine referrals to specialized employees or that other employees do not make comparable assignments, even when neither Supervisor Woodcock nor Site Manager Gele is present. Furthermore, I note that Senter was employed as a mechanic specialist at the time of the hearing. Therefore, I conclude that John Senter, is not a statutory supervisor and shall be included in the unit.

In sum, the record evidence reflects and I find that the Petitioner, as the party asserting supervisory status, has failed to meet its burden in showing that the individuals employed as working foremen and John Senter possess any of the supervisory indicia set forth in Section 2(11) of the Act, or have the authority to effectively recommend such functions and utilize independent judgement in the execution of such functions. Accordingly, I find that the working foremen and John Senter are not statutory supervisors.

Additionally, the record evidence establishes that the nature of employee skills and supervision, the degree of functional integration, the frequency of contact and interchange, and the terms and conditions of employment that exist between the individuals employed as working foremen and employees in job classifications in the stipulated unit reflect that working foremen

share a sufficient community-of-interest to be included in the same unit. *Kalamazoo Paper Box Corp*., 136 NLRB 134, 137 (1962*); Brand Precision Svcs.*, 313 NLRB 657 (1994); *Ore-Ida Foods*, 313 NLRB 1016 (1994), *aff'd* 66 F.3d 328 (7th Cir. 1995).

The working foremen spend eighty-five percent of their time working alongside employees in the stipulated unit. They perform the same tasks as other employees. The working foremen even use the same equipment as other employees in the stipulated unit. The working foremen and employees in the stipulated unit work the same hours and are paid hourly. They all get paid time and a half for overtime hours, and they have the same pay days. The working foremen, however, spend about fifteen percent of their time communicating with Site Manager Timothy Gele each day about how the job is progressing and what needs to be accomplished, and they are paid about .90 to $1 per hour more than employees in the stipulated unit.

The working foremen and employees in the stipulated unit park in the same area and enter and exit the plant through same gate. There is no distinction in the insurance received by the working foremen and employees in the stipulated unit. Moreover, the working foremen and employees in the stipulated unit supply their own hard hats, which do not have to be a designated color. The foremen do not wear any clothing that distinguishes them from employees in the stipulated unit. The record does not reflect that there is any history of collective bargaining for the working foreman or any of the employees in the stipulated unit. I conclude, therefore, that the working foremen share a sufficient community of interest with employees in the stipulated unit that warrants their inclusion in the unit.

B. The Daniel/Steiny Formula Application in the Construction Industry

The Board has a long established policy to favor and not to restrict eligibility to vote. *Ameritech Communications*, 297 NLRB 654 (1990) In 1967, the Board noted that in the construction industry, many employees experience intermittent employment and may work for short periods on different projects for several different employers in a year. *Daniel Construction Co.*, 167 NLRB 1078 (1967). Therefore, the Board established the following eligibility formula to insure that all employees with a reasonable expectation of future employment with an employer engaged in the construction industry would have the fullest opportunity to participate in a representation election:

> In addition to those in the unit who were employed during the payroll period immediately preceding the date of the Decision and Direction of Election, all employees in the unit who have been employed for a total of 30 days or more within the period of 12 months, or who have had some employment in that period and who have been employed 45 days or more within the 24 months immediately preceding the eligibility date for the election hereinafter directed, shall be eligible to vote.

Daniel at 1078 -1079.

The formula further excludes any employees who have been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. *Daniel* at 1081

In 1992, the Board confirmed the appropriateness of applying the *Daniel* formula when an employer has a relatively stable work force but also experiences sporadic employment patterns typical of the construction industry. *Steiny & Co*., 308 NLRB 1323 (1992). In *Steiny and Co*., the Board established a set of factors it considers when determining whether an employer is engaged in the construction industry: (a) intermittent employment; (b) short periods of employment on different projects; (c) several different employers in one year; and (d) short layoffs due to material shortages or because the work is dependent on the work of various crafts. *Steiny and Co*., 308 NLRB 1323 (1992).

The Board defines construction work in broad terms. For instance, the Board has held that the statutory definition of the "building and construction industry" encompasses "the provision of labor whereby materials and constituent parts may be combined on the building site to form, make, or build a structure." *Carpet, Linoleum and Soft Tile(Indio Paint and Rug Center)*, 156 NLRB 951, 959 (1966). Additionally, the Board has found that an employer who makes repairs to and replaces integral parts of an immovable structure is engaged in "construction" as used in Section 8(f) of the Act. *Garab d/b/a South Alabama Plumbing*, 333 NLRB No. 4 (2001).

In the instant case, the Employer contends that it is not engaged in the building and construction industry, and that therefore, the *Daniel/Steiny* formula is not applicable. Rather, the Employer argues that its chief function is to provide maintenance services at Plant Watson and Plant Daniels year round and that its primary and regular tasks, such as cleaning condensers, cutting grass, weed eating, replacing motor and air conditioner filters, keeping the power equipment clean, shooting tubes, maintaining a clean coal area, cleaning belts on the coal conveyor, digging out coal bunkers, cleaning marine docks, cleaning klinkers and spills and bottom ash pits, setting up tables and chairs, and cleaning and maintaining windows, are maintenance oriented tasks. The Employer acknowledges in its brief that in addition to the maintenance oriented tasks, the services it provides at Plant Watson and Plant Daniels also include building and tearing down scaffolds, installing insulation, removing asbestos, installing cabinets, floors, ceiling tiles, and storm shutters, pouring refract, and sandblasting and painting. Nonetheless, the Employer asserts that such tasks are only minimally associated with the building and construction industry.

The Board has found that the removal of asbestos and the installation of insulation "affect the structure of buildings and equipment, such as boilers and pipes, which, after installation, have become an integral part of the structure itself" and accordingly, is work in the building and construction industry. *U.S. Abatement, Inc.*, 303 NLRB 451, 456 (1991). Like the removal of asbestos and the installation of insulation, clearly the installation of cabinets and floor and ceiling tiles, as well as the pouring of refract, affect the structure of buildings and equipment and become an integral part of the structure itself. The Employer even acknowledges that some of the work it performs at Plant Watson and Plant Daniels can be classified as within the building and construction industry. However, the Employer asserts that the majority of such work is done only during the scheduled outages and accounts for only a small to medium percentage of its daily work. The record evidence betrays the Employer's assertion.

Contrary to the Employer's assertion, the evidence reflects that about fifteen to eighteen percent of the work the Employer performs at Plant Watson and Plant Daniels is the removal and installation of insulation. Even during the summer time when the boilers are on line, insulation

related tasks still account for three percent of the work the Employer performs at Plant Watson. Moreover, the evidence reflects that the Employer has a crew that constantly performs scaffolding related work, which accounts for about eighty-five percent of the work the Employer performs at Plant Watson and Plant Daniels.

Further, the Employer, on the basis of footnote 16 in *Steiny & Co.* that provides "[o]ne exception to the application of the formula in the construction industry exists where the employer clearly operates on a seasonal basis," contends that the work it performs is not considered construction because its business operation is seasonal, "consisting of the power industry's outage and peak seasons." The Employer cites *Dick Kelchner Excavating Co.*, 236 N.L.R.B. 1414 (1978) in support of its contention that the *Daniel/Steiny* formula is inapplicable to employers that clearly operate on a seasonal basis.

In *Kelchner Excavating*, the employer was engaged in excavation and site development. The employer hired laborers to work during the summer season such that the employer's general workforce averaged approximately 60 employees between May and November, the "peak season" whereas, between November and April, the "off season," the employer's general workforce averaged approximately 25 employees. In declining to utilize the *Daniel* formula, the Board noted in a footnote, "[t]here is no evidence of intermittent, as opposed to seasonal, employment or that a substantial number of the employees involved work for several different employers during the year." Accordingly, the Board found that the election should be held during a period when the employer was at full operation.

The record reflects that the Employer maintains a core workforce throughout the year of approximately sixteen (16) employees, excluding the stipulated statutory supervisors Timothy Gele, Patsy Gele, and Bryan Woodcock. Ten of these employees work at Plant Watson and the other six employees at Plant Daniels. The record reflects that the work performed by the outage employees, is not the typical maintenance work performed by the Employer but instead is related more to the construction and repair of the facility. Clearly, the use of the *Daniel* formula "by no means excludes core employees, however that term may be defined; it simply enfranchises employees who, although working on an intermittent basis, have sufficient interest in the employer's terms and conditions of employment to warrant being eligible to vote and included in the unit." *Steiny* at 1328. The record discloses that, in addition to its core workforce, each year, the Employer employs "outage employees" for short periods of employment during the period January through May. During the 2005 scheduled outages, the Employer hired approximately eighteen (18) outage employees. The "outage employees" are told at the beginning of their employment the number of weeks they will be working. Each year, the Employer retains about forty percent of it's work force at the conclusion of the scheduled outages. The remaining "outage employees" are then free to seek employment with a different employer. Thus, the record shows that the Employer employs outage employees on an intermittent basis for short periods of time and that the "outage employees" are terminated when the work is complete. Some terminated "outage employees", approximately three or four a year, return to work with the Employer from one year to the next. I find the Employer's reliance on the "termination" of the outage employees to be misplaced. In this regard, I note that the employees are not "terminated" for cause but are simply terminated due to lack of work. The Board has found that the "termination" element of the test relates to the "reasonable expectation of future employment." Thus, in both *Wilson & Dean Construction Co., Inc.*, 295 NLRB 484 (1989) and *Steiny*, the Board found that the reasonable expectation of return of terminated employees

warranted their inclusion in the unit. There is no evidence that the former employees will not be considered for reemployment. Moreover, the evidence actually demonstrates that some "outage employees do, in fact, return year after year.

The evidence reflects that within the last year and a half, the Employer, due to budget restraints imposed by Mississippi Power, has laid off its entire workforce three times at Plant Daniels. The layoffs lasted from two weeks up to four months. Likewise, at Plant Watson, the Employer has laid off nearly its entire workforce twice due to budget restraints. Thus, like the outage employees, the Employer's core workforce is also subject to intermittent employment with the Employer.

Based on the foregoing, I find that the Employer is engaged in the building and construction industry and, as is common in the construction industry, the Employer's work force needs vary based on the needs of the job. Further, I find that the facts in the instant case demonstrate that "outage employees" do have an expectation of future employment. In making this finding I note particularly that twenty to twenty-five percent of the "outage employees" return for subsequent employment. I find that "outage employees" possess a substantial interest in the Employer's terms and conditions of employment to warrant being eligible to vote and be included in the unit**.** *Steiny*, 308 NLRB at 1328. Moreover, I find that, unlike the employees in *Kelchner* who were hired to work for an entire season, the "outage employees" in the instant case are hired only to work for a specific outage. In *Kelchner*, based on the truly seasonal work of the employer, it was possible to determine when the employer was becoming fully staffed, thus, a seasonal test was appropriate. In contrast, in the instant case, because of the intermittent nature of the outages themselves, I find it more appropriate to use the *DanielSteiny* formula. Accordingly, I find that the Employer is engaged in the building and construction industry as defined by the Board and that the *Daniel/Steiny* formula is necessary to enfranchise outage employees that possess a substantial interest in working conditions at Plant Watson and Plant Daniels.

Accordingly, eligible to vote in this matter are all unit employees that have been employed by the Employer for a total of 30 working days or more within the period of 12 months, or who have had some employment in that period and who have been employed 45 working days or more within the 24 months immediately preceding the date of this Decision and Direction of Election, and who have not been terminated for cause or quit voluntarily prior to completion of the last job for which they were hired.

III. CONCLUSIONS AND FINDINGS

Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.
2. The Parties stipulated on the record that annually, the Employer, a Louisiana Corporation, with its principal office located in Lafayette, Louisiana provides industrial maintenance services valued in excess of $50,000 for the Southern Company, also known as Mississippi Power Company, at job sites in Escatawpa and Gulfport, Mississippi. Additionally,

the Employer annually purchases and receives goods valued in excess of $50,000 at its Escatawpa and Gulfport, Mississippi job sites, which are shipped directly from points located outside the State of Mississippi. Based upon this stipulation, the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[1]

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. At the conclusion of the hearing in this matter on June 6, 2005, the Hearing Officer informed the Employer and the Petitioner that June 13, 2005 was the due date for submitting post-hearing briefs. On June 7, 2005, the Regional Director received the Employer's Motion for Extension of Time within Which to File Post-Hearing Brief. The Regional Director granted an extension and set June 15, 2005 as the new due date for submitting post-hearing briefs. The Region received the Employer's brief on June 15, 2005. The Petitioner's brief, however, was not received until the morning of June 16, 2005. On June 17, 2005, the Region received the Petitioner's Motion for Permission to File Brief out of Time. The Petitioner contends in its motion that it deposited its post-hearing brief with United Parcel Service (UPS) on June 14, 2005 and requested overnight service so that the brief would be delivered to Region 15 the morning of June 15, 2005. Petitioner further contends that on June 16, 2005, it learned that UPS, for some unknown reason, failed to pick-up its brief on June 14, 2005 and deliver it timely on June 15, 2005. The Petitioner requests that its motion be granted due to unforeseen circumstances beyond its control. I have considered the Petitioner's motion and the affidavits submitted in support of the motion and have decided to grant the motion. There is no reason to believe that Petitioner was aware on June 14, 2005 that UPS would not deliver the brief until June 16, 2005. Further, the Petitioner filed a certificate of service with its motion that reflects it served a copy of the motion to the Employer by overnight mail on June 16, 2005. I did not receive an opposition to the Petitioner's motion. Accordingly, the Petitioner's post-hearing brief has been considered.

IV. THE UNIT

Based on the foregoing, the record as a whole and careful consideration of the arguments of the parties at the hearing and in their briefs, I shall direct an election in the unit as set forth below:

> All mechanic specialists, mechanic 1, apprentice I/laborers, and working foremen employed by the Employer at Plant Daniels in Escatawpa, Mississippi and Plant Watson in Gulfport, Mississippi; excluding all office clerical employees, professional employees, managers, guards, and supervisors as defined in the Act.

[1] The parties stipulated at the hearing that the names of the Employer and the Petitioner are as they appear in the caption.

V. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.

A. Voter Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls.

In addition to those employees in the unit who were employed during the payroll period immediately preceding the date of this Decision and Direction of Election, all employees performing work in the unit set forth above are eligible to vote if they have been employed at Plant Daniels in Escatawpa, Mississippi or Plant Watson in Gulfport, Mississippi for a total of 30 working days or more within the period of 12 months, or who have had some employment in that period and who have been employed 45 working days or more within the 24 months immediately preceding the eligibility date for the election hereinafter directed, and who have not been terminated for cause or quit voluntarily prior to completion of the last job for which they were hired.

Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the International Association of Heat and Frost Insulators and Asbestos Workers, Local Union No. 55.

B. List of Eligible Voters

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *North Macon*

Health Care Facility, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the New Orleans Regional Office, 1515 Poydras Street, Suite 610, New Orleans, Louisiana 70112-3723 on or before **July 1, 2005**.

C. Notice Posting Obligations

According to Board Rules and Regulations, Section 103.20, Notice of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of election if it has not received copies of the Notice of election. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employer from filing objections based on non-posting of the Notice of Election.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by **July 8, 2005**.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, DC. If a party wishes to file one of these documents electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: www.nlrb.gov.

Dated this 24th day of June, 2005, at New Orleans, Louisiana.

/s/ [Rodney D. Johnson]
Rodney D. Johnson
Regional Director, Region 15
National Labor Relations Board
1515 Poydras Street, Suite 610
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